

5th VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES INTERNATIONAL
LAW MOOT COURT COMPETITION, 2018



MOOT PROBLEM

INTERNATIONAL COURT OF JUSTICE

SPECIAL AGREEMENT

BETWEEN

THE STATE OF BARTOVIA (APPLICANT)

AND

THE STATE OF IDRIS (RESPONDENT)

TO SUBMIT TO THE INTERNATIONAL COURT OF JUSTICE THE DISPUTE BETWEEN
THE PARTIES

CONCERNING IDRIS-BARTOVIA INTERNATIONAL INVESTMENT AGREEMENT,
2017& OBLIGATION OF BOTH NATIONS REGARDING MARKOVIAN RAGAANS

Jointly notified to the Court on 10th October 2018

Moot preposition authored by: - **Ms. Bhavya Gupta**, Faculty, VSLLS, VIPS under the support and guidance of **Prof. (Dr.) Rashmi Salpekar**, Dean, VSLLS, VIPS with special thanks to **Shri Pravin. H. Parekh**, Senior Advocate, President, **The Indian Society of International Law (ISIL)**, New Delhi, for consenting to be the Knowledge Partner and **Shri Vinai Kumar Singh**, Deputy Director, ISIL for giving their valuable opinion on moot problem.

Note: Any attempt to contact the author of moot preposition or the knowledge partner shall directly lead to disqualification and the organizers shall forfeit any amount submitted by the participants.

JOINT NOTIFICATION ADDRESSED TO THE REGISTRAR OF THE COURT

The Hague, 10th October 2018

On behalf of the State of Bartovia (“ the Applicant”) and the State of Idris (“ the Respondent”), in accordance with Article 40 (1) of the Statute of International Court of Justice, we have the honour to present before you the original Special Agreement for submission to the International Court of Justice of the dispute between the Applicant and the Respondent concerning Idris-Bartovia International Investment Agreement, 2017 and obligation of both nations regarding Markovian Ragaans, signed in the Hague, The Netherlands, on 10th October, 2018.

Ambassador of the State of Bartovia

To the Republic of Netherlands

Ambassador of the State of Idris

To the Republic of Netherlands

— ADVOCATES LEGION —

SPECIAL AGREEMENT

SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE BY THE STATE OF BARTOVIA AND THE STATE OF IDRIS ON THE DISPUTE CONCERNING IDRIS-BARTOVIA INTERNATIONAL INVESTMENT AGREEMENT, 2017 AND OBLIGATION OF BOTH NATIONS REGARDING MARKOVIAN RAGAANS

The State of Bartovia and the State of Idris,

Considering that differences have arisen between them, concerning state responsibility to implement Idris-Bartovia International Investment Agreement, 2017 and obligation of both nations regarding Markovian Ragaans;

Recognizing that the Parties concerned have been unable to settle the dispute by negotiation;

Desiring further to define the issues to be submitted to the International Court of Justice (hereinafter “the Court”) for settling this dispute;

In furtherance thereof the Parties have concluded the following Special Agreement:

Article 1

The Parties submit the questions contained in the Special Agreement (together with Corrections and Clarifications to follow) to the Court pursuant to Article 40(1) of the Court’s Statute.

Article 2

It is agreed by the Parties that State of Bartovia shall act as Applicant and the State of Idris as Respondent, but such agreement is without prejudice to any question of the burden of proof.

Article 3

(a) The Court is requested to decide the Case on the basis of the rules and principles of international law, including any applicable treaties.

(b) The Court is also requested to determine the legal consequences, including the rights and obligations of the Parties, arising from its Judgment on the questions presented in the Case.

Article 4

(a) Procedures shall be regulated in accordance with the applicable provisions of the Official Rules of the Fifth VIPS International Moot Court Competition.

(b) The Parties request the Court to order that the written proceedings should consist of Memorials presented by each of the Parties not later than the date set forth in the Official Schedule of the Fifth VIPS International Moot Court Competition.

Article 5

(a) The Parties shall accept the Judgment of the Court as final and binding and shall execute it in its entirety and in good faith.

(b) Immediately after the transmission of any Judgment, the Parties shall enter into negotiations on the modalities for its execution.

In witness whereof, the undersigned, being duly authorized, have signed the present Special Agreement and have affixed thereto their respective seals of office.

Done in The Hague, The Netherlands, this day of October 10th in the year 2018, in triplicate in the English language.

Ambassador of the State of Bartovia

To the Republic of Netherlands

Ambassador of the State of Idris

To the Republic of Netherlands

BARTOVIA v. IDRIS

1. Bartovia and Idris, both member states of United Nations, are sovereign nations. Both states respect International Law and its obligations. Bartovia and Idris are neighboring countries. Bartovia is a low lying riverine country located between the foothills of the Mount Sapo and the Indriana Ocean. It is bound by Idris to the north, east and west, Markovia to the southeast and by the Bay of Benegal to the south. The country is characterized by alluvial plains which are dissected by numerous connecting rivers as well as streams and the country is vulnerable to both flood and drought. The land is devoted mainly to agriculture due to its fertile alluvial soils.

Background: Bartovia- Markovia refugee crisis

2. Markovia is an under developed nation. The Aldovia region of Markovia, like the Kolechia state, the Krakozhia state, and the special division of the Cordonias, has witnessed insurgency since Markovia's independence in 1948. The Ragaans are descendants of Arab and Persian traders who settled in the Aldovia region, and there has been intermarriage with the indigenous population over several hundred years. The population of the Ragaan in this region is about 3 million. Theregion has a common boundary with Bartovia, separated by the Naphtalia River and interspersed with forests and hills. The Aldovia province has been traditionally under the influence of Bartovian culture because of its proximity to Bartovia.
3. There had been several displacements of the Ragaans, the major one being in 1998, when the Markovia government announced that there was an alarming increase in the number of illegal migrants from Bartovia, in the Aldovia region. A campaign disguised as a search for illegal immigrants produced a wave of refugees to Bartovia. At least 130,000 Ragaans had deserted their homes and went over to Bartovia. The Markovia authorities maintained that those who had fled across the border were Bartovia nationals who had illegally entered Markovia.

4. In Markovia, during general elections in 2005, the Ragaans supported the National Liberation Front for Democracy (NLD), whose focus was termination of military rule in Markovia. The military regime, under the State Law and Order Restoration Council, negated the results of the general election and intensified its campaign against the ethnic minorities who supported the NLD. The Markovia authorities alleged that the Ragaans in general were aiding, abetting, and hiding the insurgents who were supporting an independent state of Aldovia. The authorities issued arrest warrants against 10,000 students for an alleged insurgency plot against the State. Subsequently the army terrorized the entire Ragaan population, who started deserting their homes.
5. Under International pressure and to maintain good relations with Bartovia, Markovia authorities agreed to accept the Ragaan refugees in Bartovia on basis of some evidence of prior residence in Markovia and an international agreement was signed in May 2010 by the foreign ministers of both the countries for “safe and voluntary repatriation” of Ragaan refugees. However, majority of Ragaans were against it and refused to go back as they feared being persecuted in Markovia.
6. In 2011, devastating cyclones struck Bartovia in which 200 nationals died, many injured, 86 refugees died and 12 out of 19 camps were completely razed to the ground. Since Bartovian economy is majorly based on cash crops, flooding and high winds destroyed the crops and a situation of famine and malnutrition began to surface. There was less income from exports and Bartovia experienced a general economic slowdown. Additionally, it faced cost of creating new infrastructure. Businesses were closed down and unemployment increased. The economy of Bartovia took a serious hit and marked the beginning of recession. Certain political factions in Bartovia blamed the influx of Ragaan refugees in the country as a cause of rising unemployment in the country. The general mood of the Bartovian public was hostile towards the refugees.
7. The repatriation came to a virtual halt in 2012 when Markovian authorities demanded re-verification of individual refugees who had earlier been cleared for repatriation. There were also fresh cases of Ragaans from Markovia returning to Bartovia during this period

due to sustained persecution of Ragaans in Markovia. This led to an increased unrest between Bartovian nationals and widespread protests throughout the country against Ragaans started.

8. In 2013, Bartovian Armed Forces started pushing back groups of Ragaans coming from Markovia at Bartovian Borders. They were apprehended while crossing the border and were formally handed over to the Markovia Border Security Force. Bartovia announced that it would not allow Ragaans to settle in the country permanently and since Bartovia is itself a developing nation, it should be the responsibility of developed neighboring nations like Idris to settle them. Bartovia, with its limited resources, cannot and should not bear the additional burden of allowing Ragaans to stay in Bartovia permanently. Markovian authorities, in the meantime, had set a deadline for repatriation stating that the repatriation of remaining refugees must be completed by December 2017.
9. Tension, chaos and confusion began to mount inside refugee camps. Incidents of bloody clashes between Bartovian security forces and armed refugee militants who were opposing the process of repatriation became rampant. Large contingents of Bartovian forces raided the camps, apprehended refugees and made number of arrests.
10. In search of better life, Ragaans started to flee from Bartovia to the neighboring area Mizo in Idris where cheap and fast labour was becoming popular in manufacturing of Solar Panels by SMEs.

Idris National Solar Program

11. In 2010, Idris launched National Solar Program aiming to establish Idris as a global leader in solar energy by creating the policy conditions for its diffusion across the country as quickly as possible. To incentivize the production of solar energy within the country, the government under the program agrees to enter into long-term power purchase agreements with solar power producers, effectively guaranteeing the sale of the energy produced and the price that such a solar power producer could obtain. Thereafter, it would sell such energy through distribution utilities to the ultimate consumer. However, a

solar power producer, to be eligible to participate under the program, is required compulsorily to use certain domestically sourced inputs, namely solar cells and modules for certain types of solar projects. In other words, unless a solar power producer satisfies this domestic content requirement, the government will not guarantee the purchase of the energy produced.

12. In late 2017, the WTO Panel for Dispute settlement, upon receiving complaint, ruled that Idris's National Solar Program is in violation of the global trading rules. Specifically, it said, Idris has violated its "national treatment" obligation by unfavourably discriminating against imported solar cells and modules. In other words, Idris was discriminating between solar cells and modules which were otherwise identical on the basis of the national 'origin' of the cells and modules, a clear violation of its trade commitment under WTO Agreement as well as TRIMs. However, Idris has gone for appeal against such ruling principally relying on the 'government procurement' justification, which permitted countries to derogate from their national treatment obligation provided that the measure was related to "the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or use in production of goods for commercial sale". Idris also argued that the measure was justified under the general exceptions since it was necessary to secure compliance with its domestic and international law obligations relating to ecologically sustainable development and climate change.

13. As a result of this ruling, the domestic small and medium scale producers of solar cells and modules for solar plants suffered huge losses and were closed down as the Foreign Investors began to use solar cells and modules from third states which were of better compliance with International standards. Abrupt closure of SMEs in Idris rendered the Ragaans in Mizoas also other indigenous population at a loss of livelihood. This further strengthened the feeling of hatred amongst the residents of Mizo against Ragaans with whom they were already competing for livelihood. State-wide violent protests targeting Ragaans erupted and abuses including forced evictions, destruction of property, arbitrary arrests, torture, and killings started in Mizo. Ragaans, who have already been at the

receiving end of such hatred since as long as they could remember, vowed not to be suppressed this time. They formed allegiance with extremists groups and formed an organized armed group for actively establishing their control over Mizo.

14. In early 2017, Idris had entered into an International Investment Agreement with Bartovia whereby Investors from Bartovia agreed to invest in production of solar energy in Idris subject to the domestic content requirement for initially a period of five years w.e.f 2018. Many bids were made and were accepted by the Government of Idris. However, after the ruling of WTO and closure of units manufacturing Solar cells due to losses and unavailability of cheap labour, Idris communicated to all the solar power producers of its inability to provide Solar cells and waived the Domestic Content Requirement (“DCR”) for Solar cells. However, DCR for modules was retained but at higher rate as the same began to be assembled in Idris after buying solar cells and metal from other States. Government of Bartovia, in interest of its investors, called upon the Government of Idris to comply with its treaty obligation and to fulfil its contractual obligations with Investors as per proposals (bids) accepted as Bartovia does not have any solar cell manufacturing units.

15. The Government of Idris reacted by announcing its intention to deport Ragaans, being undocumented migrants in Idris, back to Bartovia, from where they entered into Idris as their continued stay has resulted into serious national security ramifications for Idris. The government also alleged having security inputs indicating links of Ragaans with certain extremists groups that want to spread communal and sectarian violence in Idris. However, many migrants were charge-sheeted and sent to central jails to be prosecuted instead of deportation. This led to a mass scale separation of families especially of children from their parents who were forced to leave the country without their guardians.

16. Realising the unfortunate fate of Ragaans and in their own economic interests of being beneficiaries of the solar power production by Idris, major powers of the world intervened and mediated between Idris and Bartovia and were successful in encouraging them to refer their dispute to ICJ.

17. A special agreement to submit the dispute to the ICJ was signed by the ambassadors of both Idris and Bartovia in New York in the presence of their prime ministers, when they visited the UN headquarters for Annual UN General Assembly session during October 2018.
18. Along with the Universal Declaration of Human Rights, both the States have signed and ratified International Covenant on Civil and Political Rights, 1966, International Covenant on Economic, Social and Cultural Rights, 1966, Geneva Conventions, 1949 and its Additional Protocols, 1977, Marrakesh Agreement establishing WTO 1994, International Convention on elimination of all forms of Racial Discrimination, International Convention on Protection of the Rights of All Migrant Workers and Members of their Families 2003; 1985 GA Res. No. 40/144 “Declaration on Human Rights of Individuals who are not nationals of the country in which they live”, United Nations Declaration on Territorial Asylum , 1967 and Bangkok Principles, 1966.
19. Bartovia has signed and ratified the International Convention relating to the Status of the Refugees, 1951 and United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
20. Idris has signed but not ratified United National Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Convention for protection of all persons from Enforced Disappearance, 2006.

Issues:

21. Bartovia requests the Court to adjudge and declare:
 - a) That Idris cannot withdraw from its obligation incurred under Idris-Bartovia International Investment Agreement, 2017 by altering terms of contract entered into with Investors of Bartovia. That Idris, by such untimely withdrawal has caused damages to Investors in Bartovia and should pay compensation for the same in addition to continuation of contract on original terms.

- b) That Bartovia is not under any obligation to accept return of Ragaans as they left voluntarily and that Idris is bound by the customary international law principle of non-refoulement and cannot forcibly repatriate Ragaan refugees to Bartovia.
- c) That Idris has violated its obligation under International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families and in particular Article 22 of the convention by expelling them collectively and forcibly and that the arbitrary arrests and detentions of Ragaans in Idris is against the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live [GA Res. No. 40/144 (1985)]
- d) That breakdown of families by separation of children from parents due to forceful deportation amounts to gross human rights violation by the State of Idris and is also violative of its obligation under International Human Rights Instruments including Convention on the Rights of the Child.

22. Idris requests the Court to adjudge and declare:

- a) That Idrish has not withdrawn from its obligation under the Idris-Bartovia International Investment Agreement, 2017 and is still performing the contracts with investors. That the change in terms of the contract is due to decision of World Trade Organisation and as such Idris cannot be made liable for change in circumstances that occurs due to external factors.
- b) That Bartovia has an obligation to accept Ragaans because by subjecting its refugees to torture, violence and forced repatriation (refoulement) to their country of origin, due to which they illegally entered into Idris, Bartovia has violated its obligation under the Refugee Convention 1951 and such flight cannot be termed as 'voluntary'. Further, Idris is not bound by the principle of non-refoulement as Ragaans are undocumented migrants and not refugees in Idris. Idris is also not bound by the customary international law principle of non-refoulement or under any other similar international obligation as there exists reasonable grounds for considering Ragaans as a danger to its national security and integrity.
- c) That the collective expulsion of undocumented persons is justified in wake of threat to peace and security of Idris and that arrests were not arbitrary as Ragaans

were found to be actively engaged in acts of hostilities against the nationals of Idris.

- d) That in fulfilment of its international human rights obligation, Idris has refrained from detaining children with their parents and have safely deported them to Bartovian Borders.



—ADVOCATES LEGION—

INTERNATIONAL INVESTMENT AGREEMENT

APPENDIX A – EXCERPTS FROM IDRIS-BARTOVIA INTERNATIONAL INVESTMENT AGREEMENT FOR SUPPLY & INSTALLATION OF SOLAR POWER SYSTEMS 2017

CONTRACT PERIOD: 1 June 2018 to 31 May 2023 (plus 1 optional extension of up to 12 months)

BILATERAL INVESTMENT TREATY

BETWEEN

THE GOVERNMENT OF IDRIS

AND

GOVERNMENT OF BARTOVIA

Preamble

The Government of the Republic of India and the Government of Bartovia (hereinafter referred to as the “Party” individually or the “Parties” collectively);

Desiring to promote bilateral cooperation between the Parties with respect to foreign investments; and

Recognising that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development,

Reaffirming the right of Parties to regulate investments in their territory in accordance with their law and policy objectives.

Recognising the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development;

Understanding that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept;

Seeking an overall balance of the rights and obligations among the State Parties, the investors, and the investments under this Agreement;

Have agreed as follows:

Article 1: Objective

The main objective of this Agreement is to encourage and increase investments between investors of one State Party into the territory of the other State Party that support the sustainable development of each Party, and in particular the Host State where an investment is to be located.

Article 2 : Definitions

Home State means, in relation to -

1. a natural person, the State Party of nationality or predominant residence of the investor in accordance with the laws of that State Party ;
2. a legal or juridical person, the State Party of incorporation or registration of the investor in accordance with the laws of that State Party, and declared as the Home State at the time of registration where required under the law of the Host State.

Host State means the State Party where the investment is located.

Investor means a natural person or a juridical person of the Home State Party making an investment into the territory of the Host State Party, provided that:

1. the natural person, if a dual citizen, is predominantly a resident of the Home State and in any event is not a national of the Host State Party as well.
2. for a juridical person, it is a legally incorporated enterprise under the laws of the Home State and is effectively owned or controlled by a natural or juridical person of the Home State Party.

Article 4: Non discrimination

Subject to Article 5, each State Party shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, in like circumstances, to its own investors and their investments with respect to the management, operation and disposition of Investments in its territory.

Article 5: Domestic Content requirement

All investors engaged as Solar Power Developers are required to procure their project components *inter alia* solar cells and solar modules from domestic manufacturers in the Host State

— ADVOCATES LEGION —

APPENDIX B – EXCERPTS FROM BARTOVIA- MARKOVIAARRANGEMENT ON SAFE AND VOLUNTARY REPATRIATION OF RAGAANS DISPLACED FROM ALDOVIA 2010

The Government of Bartovia and The Government of Markovia:

Reiterating their firm conviction to resolve their problems amicably and peacefully through bilateral negotiations on the basis of mutual understanding, trust, accommodation and goodwill and maintain peace and tranquility on their borders , and in particular the multifarious challenges that both countries face for outflow of displaced people from Aldovian region;

Mindful of the fact that significant numbers of Ragaans from aldovia state and other communities who were residents of Markovia, have taken shelter in Bartovia. This arrangement concerns the repatriation of the residents of Aldovia state who have crossed over to Bartovia;

In Recognition of the need for sustainable and durable solutions, Markovia and Bartovia have agreed to start the process of voluntary return in safety, security and dignity with options for recommencing livelihood, after verification that returnees have been residents of Markovia; and

Considering all relevant documents, facts and requirement for sustainable return of displaced Markovia residents,

Have agreed to this arrangement that outline general principle, policy aspects and modalities needed to be agreed upon to ensure smooth conduct of return of displaced Markovia residents from Aldovia state expeditiously and their integration into Markovian society :

1. The process of return will commence at the earliest and shall be completed in a time bound manner agreed by both the parties.
2. Markovia has agreed to take necessary measures to halt the outflow of Markovia residents to Bartovia, to restore normalcy in Aldovia and to encourage those who have left Markovia to return voluntarily and safely to their own households and original places of residence or to a safe and secure place nearest to it of their choice. Markovia will take all possible measures to see that the returnees will not be settled in temporary places for a long period of time and their freedom of movement in the Aldovia state will be allowed

in conformity with the existing laws and regulations. Their access to basic services and livelihood will be further promoted. Markovia will issue the returnees an identity card for national verification immediately on their return.

3. Verification for return, being essentially different from the ongoing national verification process for those who are residing in Aldovia towards their citizenship, will be based on evidence of past residence in Markovia.
4. The two governments would duly associate with the UNHCR, as and when needed, to assist them in the process of safe and voluntary repatriation.
5. Markovia will not criminalise (i.e. prosecute or penalise) returnees for illegal exit and return unless there are specific cases of their involvement in terrorist or criminal activities.
6. There shall be no restriction on the number of persons to be repatriated so long as they can establish bona-fide evidence of their residence in Markovia.
7. In cases of dispute on eligibility for return to Markovia, the two sides shall sit with all documents and information to resolve such cases. The final decision regarding verification will be made by the Government of Markovia. Government of Markovia will try to resolve cases of dispute on eligibility as soon as possible, preferably within 6 months.
8. After completion of return, the two government shall cooperate for the prevention of the illegal crossing of the border by persons from either side. Both governments shall refrain from granting residence or citizenship to such illegal migrants. Such persons crossing borders in an unauthorized manner shall be returned following the agreed provisions in the 1980 agreement on border arrangement and cooperation.
9. The two governments agree to work for a comprehensive and durable solution of the issue so as to prevent its recurrence in the future.
10. Both parties reaffirmed their desire to maintain and promote the existing friendly and good neighbourly relations.

On behalf of the Government of Bartovia

On Behalf of Government of Markovia